

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AUDREY MCNAMARA NEVIS,

Plaintiff,

No. C 07-2568 MHP

v.

MEMORANDUM AND ORDER
Re: Gateway Title Company's Motion to Dismiss

WELLS FARGO BANK, EXECUTIVE
FINANCIAL LENDING INC., JOHN B.
SPEAR, SHAI MOSHE, GATEWAY TITLE
COMPANY, QUALITY LOAN SERVICES
CORP. and DOES 1–100, inclusive,

Defendants.

Plaintiff Audrey McNamara Nevis (“plaintiff”) brought this action against defendants Wells Fargo Bank (“Wells Fargo”), Executive Financial Lending Inc. (“Executive”), John B. Spear (“Spear”), Shai Moshe (“Moshe”), Gateway Title Company (“Gateway”), Quality Loan Services Corp. (“Quality”) and Does 1–100, inclusive, bringing a variety of claims arising out of a home loan and possible foreclosure of her home. Gateway now moves to dismiss plaintiff’s claims against it for failure to state a claim upon which relief may be granted. Having considered the arguments and submissions of the parties, and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND¹

Plaintiff is an 82-year-old woman living in Marin County, California. Compl. ¶ 1. Plaintiff purchased a home in San Rafael, California in 1988. *Id.* ¶ 27. As of February 2007, plaintiff’s home had a value of approximately \$930,000 with a mortgage of approximately \$880,000. *Id.* In September 2006,² defendant Moshe telephoned plaintiff in an effort to sell her a mortgage loan.

1 Id. ¶ 28. Moshe informed plaintiff that he would produce a loan at “no cost” with monthly payments
2 significantly lower than what she was paying at the time, along with other representations regarding
3 the loan. Id. Defendant ultimately obtained the loan by following Moshe’s instructions. Id. ¶¶
4 29–33. The escrow for the loan was handled by defendant Gateway. Id. ¶ 33.

5 Plaintiff alleges that at the time of soliciting and assisting plaintiff in obtaining the loan,
6 “defendants knew or should have known that plaintiff was 81 years old, financially unsophisticated,
7 unemployed with a total average monthly income of about \$1,050, and that she had been unable to
8 refinance her home despite having contacted other lenders,” and that therefore she was not qualified
9 for a mortgage. Id. ¶ 34. Plaintiff further alleges that “Defendants” knew or should have known that
10 plaintiff would be unable to make the monthly payments, the loan would fall into default, and the
11 property would be sold in foreclosure. Id. ¶ 35. Plaintiff asserts that her home is now subject to a
12 higher mortgage than the mortgage plaintiff had prior to obtaining the loan, that the loan is in arrears
13 in the amount of at least \$20,000, that plaintiff has suffered additional costs and expenses, and that
14 plaintiff faces the imminent threat of foreclosure. Id. ¶ 45.

15 Apart from general references to “defendants” as a group, plaintiff’s complaint contains only
16 two specific references to Gateway. These references are limited to identifying Gateway as the title
17 and escrow company that closed the loan and acted in the capacity of plaintiff’s fiduciary for this
18 purpose. Id. ¶¶ 20 & 33.

19 Gateway now moves to dismiss all of plaintiff’s claims against it for failure to state a claim
20 upon which relief may be granted.

21 22 LEGAL STANDARD

23 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal
24 sufficiency of a claim.” Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule
25 12(b)(6) focuses on the “sufficiency” of a claim—and not the claim’s substantive merits—“a court
26 may [typically] look only at the face of the complaint to decide a motion to dismiss.” Van Buskirk
27 v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). Although the court is generally
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1 confined to consideration of the allegations in the pleadings, when the complaint is accompanied by
2 attached documents, such documents are deemed part of the complaint and may be considered in
3 evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265,
4 1267 (9th Cir. 1987).

5 A motion to dismiss should be granted if plaintiff fails to proffer “enough facts to state a
6 claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, ___ U.S. ___, 127 S. Ct.
7 1955, 1974 (2007). Dismissal can be based on the lack of a cognizable legal theory or the absence
8 of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901
9 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the
10 light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38
11 (9th Cir. 1996). The court need not, however, accept as true allegations that are conclusory, legal
12 conclusions, unwarranted deductions of fact or unreasonable inferences. See Sprewell v. Golden
13 State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Clegg v. Cult Awareness Network, 18 F.3d 752,
14 754–55 (9th Cir. 1994).

15 16 DISCUSSION

17 Plaintiff brings nine causes of action against Gateway: (1) violations of the Truth in Lending
18 Act (“TILA”), 15 U.S.C. sections 1601 et seq. and Regulation Z; (2) violations of the Real Estate
19 Settlement and Procedures Act (“RESPA”), 12 U.S.C. section 2602; (3) fraud and deceit; (4) elder
20 abuse pursuant to California Welfare & Inst. Code section 15600; (5) breach of fiduciary duty; (6)
21 breach of contract; (7) rescission and restitution; (8) unfair business practices pursuant to California
22 Bus. & Prof. Code section 17200; and (9) negligence. The court will consider each cause of action
23 in turn.

24 25 I. Truth in Lending Act

26 Gateway asserts that it cannot be found liable under TILA because it is not a “creditor” as
27 defined in the act and Regulation Z, promulgated pursuant to the act. By its terms, TILA provides
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1 for civil penalties only against creditors. 15 U.S.C. § 1640(a) (“any creditor who fails to comply
 2 with any requirement imposed under this part . . . with respect to any person is liable to such
 3 person”); see also Redic v. Gary H. Watts Realty Co., 762 F.2d 1181, 1185 (4th Cir. 1985) (“Only
 4 ‘creditors’ are subject to the Act’s civil penalties.”). Under TILA,

5 [t]he term “creditor” refers only to a person who both (1) regularly extends, whether
 6 in connection with loans, sales of property or services, or otherwise, consumer credit
 7 which is payable by agreement in more than four installments or for which the
 8 payment of a finance charge is or may be required, and (2) is the person to whom the
 debt arising from the consumer credit transaction is initially payable on the face of
 the evidence of indebtedness or, if there is no such evidence of indebtedness, by
 agreement.

9 15 U.S.C. § 1602(f). Plaintiff’s only allegation in this regard is that “[d]efendants are creditors
 10 within the meaning [sic] TILA.” Compl. ¶ 47. Plaintiff responds to this argument only by
 11 discussing the general goals and principles of TILA and asserting, with no citation to authority, that
 12 Gateway was the party responsible for delivering the necessary disclosure forms to plaintiff.
 13 Plaintiff appears to argue that Gateway was the lender’s agent for the purposes of delivering the
 14 disclosure forms, but this allegation appears nowhere in the complaint. Accordingly, the TILA and
 15 Regulation Z claim against Gateway must be dismissed. Because plaintiff has set forth no facts in
 16 her complaint or in her filing on this motion that could bring Gateway within this statute, this claim
 17 is dismissed without leave to amend.

18 19 II. RESPA

20 Plaintiff’s RESPA claim states that “[d]efendants have violated RESPA by failing to make
 21 and provide the required written disclosure, by taking kickbacks and unearned fees and by making
 22 and collecting prohibited charges in violation of section 8 of RESPA.” Compl. ¶ 56. Again, no
 23 specific allegations related to the conduct or responsibilities of Gateway appear in this claim.
 24 Plaintiff argues in her opposition that, because Gateway failed to provide the required disclosures,
 25 the fees that Gateway collected for its services as an escrow agent were improper. Assuming that
 26 this legal theory could support a RESPA claim, plaintiff has once again failed to allege that Gateway
 27 was responsible for making the disclosures. Furthermore, plaintiff’s complaint contains no
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1 allegations related to the purported disconnect between Gateway's fees and its services rendered.
2 Plaintiff's RESPA claim against Gateway is therefore dismissed with leave to amend. The court is
3 doubtful that plaintiff can allege facts necessary to bring Gateway within the purview of RESPA.
4 However, it will allow plaintiff the opportunity to amend to allege the requisite facts if she can do
5 so.

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7 III. Fraud and Concealment

8 Gateway asserts that plaintiff's claim of fraud and concealment is not pled with the
9 particularity required by Federal Rule of Civil Procedure 9(b). In federal actions where state law
10 governs fraud claims, the pleading requirements are nonetheless governed by the Federal Rules of
11 Civil Procedure. Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1985). When pleading fraud, "the
12 circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b).
13 Fraud allegations must "be specific enough to give defendants notice of the particular misconduct .
14 . so that they can defend against the charge and not just deny that they have done anything wrong."
15 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotations omitted).
16 To comply with Rule 9(b), a complaint must "state the time, place, and specific content of the false
17 representations as well as the identities of the parties to the misrepresentation." Edwards v. Marin
18 Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004) (internal quotations omitted).

19 Once again, plaintiff's complaint contains no specificity whatsoever as to Gateway's
20 allegedly fraudulent conduct. Plaintiff's opposition once again discusses Gateway's alleged failure
21 to provide TILA disclosures, but these allegations are absent from the complaint. Plaintiff's
22 opposition contains an additional argument regarding the large distance between plaintiff's home
23 and Gateway's place of business. The factual allegations plaintiff makes in her opposition are
24 totally missing from the complaint. Even with these allegations, however, if there is nothing more
25 than these, it is doubtful they would be sufficient to withstand a motion to dismiss. Nonetheless, the
26 court will allow plaintiff to amend this claim, advising that the amended complaint must allege facts
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1 with the particularity as required by Rule 9(b). The fraud and deceit claim against Gateway is,
2 therefore, dismissed with leave to amend.

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4 IV. Elder Abuse

5 To state a claim for elder abuse under California law, a plaintiff must allege that the
6 defendant (1) took, secreted, appropriated, or retained real or personal property of an elder or
7 dependent adult to a wrongful use or with intent to defraud, or both; or (2) assisted in taking,
8 secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a
9 wrongful use or with intent to defraud, or both. Cal. Welfare & Inst. Code § 15610.30(a). Plaintiff's
10 allegations related to the conduct of the defendants in her elder abuse claim are limited to the
11 following:

12 Defendants, with knowledge that Plaintiff is an elder, gained Plaintiff's trust and
13 induced her to enter into a detrimental loan. By their acts, defendants appropriated
14 Plaintiff's personal and real property to a wrongful use and with the intent to defraud,
or assisted in such acts. Defendants acted in bad faith as they knew or should have
known that Plaintiff had the right to the property illegally appropriate by them.

15 Compl. ¶ 68. Again, Gateway's purported role in the alleged elder abuse is entirely unclear from
16 the complaint. Plaintiff's opposition again mentions Gateway's alleged failure to provide
17 disclosures, and cites to a completely irrelevant case. Plaintiff's elder abuse claim falls far short of
18 what is necessary to come within the statute. Again, however, the court will grant leave to amend if
19 plaintiff can do so, spelling out in detail the actions Gateway took that bring it within the statute.
20 This claim is dismissed with leave to amend.

21
22 V. Breach of Fiduciary Duty

23 Gateway asserts that plaintiff's claim for breach of fiduciary duty must be dismissed because
24 an escrow holder's duties are limited to following escrow instructions, rather than general fiduciary
25 duties. "An escrow holder is an agent and fiduciary of the parties to the escrow." Summit Fin.
26 Holdings, Ltd. v. Continental Lawyers Title Co., 27 Cal. 4th 705, 711 (2002). The California
27 Supreme Court has defined the fiduciary duties of an escrow agent as follows.

1 In delimiting the scope of an escrow holder's fiduciary duties, then, we start from the
2 principle that an escrow holder must comply strictly with the instructions of the
3 parties. On the other hand, an escrow holder has no general duty to police the affairs
4 of its depositors; rather, an escrow holder's obligations are limited to faithful
5 compliance with the depositors' instructions. Absent clear evidence of fraud, an
6 escrow holder's obligations are limited to compliance with the parties' instructions.

7 Id. (quotations and citations omitted). Here, plaintiff has identified no instructions given by plaintiff
8 with which Gateway failed to comply. Likewise, as discussed above, plaintiff has failed to
9 sufficiently plead any fraudulent conduct on the part of Gateway. Accordingly, plaintiff's breach of
10 fiduciary duty claim against Gateway is dismissed with leave to amend, if plaintiff can allege facts
11 specific to Gateway sufficient to show the duty Gateway owed to plaintiff, the bases and extent of
12 that duty and Gateway's breach of that duty.

13 VI. Breach of Contract

14 Plaintiff's allegation regarding her breach of contract claim is as follows: "Defendants
15 offered to enter into a contract with Plaintiff under which defendants promised to secure a mortgage
16 loan for Plaintiff, on certain terms including but not limited to a 'no cost' loan that would reduce her
17 monthly mortgage payments, and Plaintiff accepted the offer, as alleged above." Compl. ¶ 86. The
18 complaint contains no mention of any contract between plaintiff and Gateway, and it seems unlikely
19 that an escrow agent would contract with plaintiff to secure a mortgage. Plaintiff's opposition
20 discusses only an alleged contract between plaintiff and Gateway where by Gateway agreed to act as
21 the escrow agent. This contract is not even mentioned in the complaint. Accordingly, having failed
22 to allege the existence of a contract in her complaint, plaintiff has failed to plead a cause of action
23 for breach of contract against Gateway. This claim is dismissed with leave to amend if plaintiff can
24 allege a contract between her and Gateway and detail what the terms of that contract were and the
25 facts stating the breach.

26 VII. Rescission and Restitution

27 Plaintiff's claim against Gateway for rescission and restitution must be premised on a
28 contract between plaintiff and Gateway. As discussed above, plaintiff has failed to plead the

1 existence of a contract, let alone a cause of action for breach of contract. Accordingly, plaintiff has
2 not properly pled a claim for rescission and restitution.

3
4 VIII. Unfair Business Practices

5 California law “defines ‘unfair competition’ as any ‘unlawful, unfair or fraudulent business
6 practice and unfair, deceptive, untrue or misleading advertising” Bank of the W. v. Superior
7 Court, 2 Cal. 4th 1254, 1266 (1992) (quoting Cal. Bus. & Prof. Code § 17200). As plaintiff points
8 out, “[w]hether any particular conduct is a business practice within the meaning of section 17200 is
9 a question of fact dependent on the circumstances of each case.” People v. E.W.A.P. Inc., 106 Cal.
10 App. 3d 315, 320–21 (1980). However, as with plaintiff’s other claims, plaintiff’s unfair business
11 practices claim fails to allege any “particular conduct” whatsoever on the part of Gateway.
12 Plaintiff’s unfair business practices claim against Gateway must therefore be dismissed. Leave to
13 amend is allowed, but plaintiff must allege the particular conduct, practices or activities of Gateway
14 that give rise to this claim.

15
16 IX. Negligence

17 Plaintiff’s negligence claim asserts that “defendants owed a duty to Plaintiff to exercise
18 reasonable care in the processing of his [sic] loan application, advising her on financial matters,
19 distributing her loan proceeds and dealing with the foreclosure of her home,” as well as training and
20 supervising their employees to comply with applicable laws. Compl. ¶¶ 109–111. Again,
21 plaintiff’s complaint is devoid of any allegations as to Gateway’s role in the delineated activities,
22 and therefore plaintiff has failed to sufficiently allege that Gateway was negligent. Plaintiff’s
23 negligence claim against Gateway must be dismissed. Leave to amend is allowed if plaintiff can
24 allege the necessary facts giving rise to a duty by Gateway to plaintiff, setting forth the nature and
25 extent of that duty and how defendant breached that duty.

26
27 X. Conspiracy
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1 Although plaintiff's complaint does not contain a separate cause of action for civil
2 conspiracy, Gateway seeks dismissal of any implied conspiracy claim set forth in the factual
3 allegations of the complaint. See Compl. ¶ 23. Plaintiff does not respond to this argument in her
4 opposition. As plaintiff has not brought a cause of action for conspiracy, and this court finds no
5 basis for reading such into the complaint, there is nothing for this court to dismiss with respect to
6 this aspect of the motion.

7
8 XI. Leave to Amend

9 The Federal Rules of Civil Procedure provide that leave to amend be "freely given when
10 justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit has construed this broadly, requiring
11 that leave to amend be granted with "extraordinary liberality." Morongo Band of Mission Indians v.
12 Rose, 893 F.2d 1074, 1079 (9th Cir.1990); see also DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
13 186 (9th Cir.1987) (Rule 15's policy of favoring amendments to pleadings should be applied with
14 "extreme liberality"). Accordingly, plaintiff is granted leave to amend with respect to all claims
15 except the TILA claim, *if plaintiff can in good faith and consistent with the instructions above do so.*
16 The court notes that plaintiff has made no attempt in her complaint to set forth specific facts as to
17 Gateway, lumping it together with other defendants. As to some of those defendants there are
18 specific facts alleged. but that is not sufficient to state claims against another defendant, in this case
19 Gateway. Furthermore, plaintiff is not well served by the pleading of a litany of claims with little
20 focus on the conduct of the specific defendants. Plaintiff's counsel are instructed to more carefully
21 tailor the complaint and not distract from the thrust of the claims with unnecessary claims.

22 The amended complaint, if any, shall be comply with this order and be filed within twenty
23 (20) days of the filing of this order.

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CONCLUSION

For the reasons stated above, the court GRANTS Gateway's motion to dismiss without leave to amend as to the TILA claims and with leave to amend as to the other claims consistent with this order. Plaintiff is ordered to file an amended complaint, if any, according to the rulings set forth above, within twenty (20) days of the filing of this order.

IT IS SO ORDERED.

Dated: September 6, 2007



MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

1. Unless otherwise specified, background facts are taken from plaintiffs' first amended complaint, and are assumed to be true for purposes of this motion only.
2. The timeline in plaintiff's complaint appears to be off. Plaintiff asserts that she was first contacted in September 2006, but then alleges that she was visited by a notary public to sign paperwork in June 2006. Compl. ¶ 33. Presumably the initial contact occurred in September 2005.